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IN THE
SUPREME COURT OF THE UNITED STATES

TERRY L. STEWART,
Director, Arizona Dept. of Corrections, et al.,
PETITIONERS,

-vs-

JOE LEONARD LAMBRIGHT,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

CAPITAL CASE

1. May a federal court excuse a habeas petitioner's state court procedural default on the basis that the state rule was not sufficiently clear to be an "adequate" ground of decision when the record shows the defense counsel actually understood what was required by the rule when he violated it, so he was not misled and his default was not caused by the hypothetical lack of clarity in the rule?

2. May a state procedural requirement be sufficiently established by published rules alone to provide an "adequate" ground of decision that will prevent federal review, but if not, was the Arizona requirement that ineffective assistance of counsel claims be raised on direct appeal sufficiently established by cases existing prior to the appeal in this case?

3. If a state court ruling denying relief does not fairly appear to rest primarily upon federal law (the necessary predicate to application of the *Harris v. Reed* presumption), but does discuss both state-law procedural default and the federal-law merits of the claim, may federal habeas courts ignore the intended procedural default ruling in order to review the merits of the federal-law issue?

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Lambright v. Stewart, 241 F.3d 1201 (9th Cir. 2001). (Reproduced in Appendix A.)

STATEMENT OF JURISDICTION

Petitioners respectfully request that a Writ of Certiorari issue to review the decision of the United States Court of Appeals for the Ninth Circuit, which reversed the District Court's denial of habeas corpus relief and remanded for an evidentiary hearing. The United States Court of Appeals for the Ninth Circuit issued its decision on March 6, 2001. (Appendix B.) A timely combined petition for rehearing/rehearing *en banc* was denied by order filed May 15, 2001. Petitioners timely filed the petition for writ of certiorari within 90 days of that decision. This Court has jurisdiction pursuant to United States Constitution Article III, Section 2; 28 U.S.C. § 1254(1); and Supreme Court Rule 10.

PROVISIONS INVOLVED: SEE APPENDIX C.

Arizona Rules of Criminal Procedure 31.4 (and Comment); 32.2.

STATEMENT OF THE CASE

Lambright and co-defendant Robert Smith kidnapped a woman in March of 1980; Lambright repeatedly raped her and, with Smith's assistance, brutally murdered her. His convictions and sentences, including the death penalty, were affirmed on direct appeal. *State v. Lambright*, 138 Ariz. 63, 673 P.2d 1 (1983), *cert. denied*, 469 U.S. 892 (1984).

Lambright sought post-conviction relief pursuant to Rule 32, Ariz. R. Crim. P., alleging *inter alia* ineffective assistance by his trial attorney. In accordance with Arizona law the judge who had presided over the trial handled that petition and denied all relief, stating:

> The ineffective[ness] claim is not a colorable claim. The lengthy recitations in the petition when studied and reviewed against the reality [of] the trial represent merely another lawyer's guess at how witnesses should have been or might have been examined and perhaps how different tactics might have been used, all with the clarity of 20-20 hindsight. The trial court heard the motions as well as the trial and could not in good conscience find a genuine effectiveness argument. *In addition, this case was appealed on behalf of Mr. Lambright by an experienced criminal appellate attorney, not the trial attorney, who examined the entire record and transcript and failed to raise the issue on appeal, a knowing, voluntary, and intelligent waiver; therefore the defendant is precluded under Rule 32.2(a)(3)*, and the court finds that there is in fact no colorable claim of ineffectiveness.

(Minute Entry of 4/17/85; emphasis added.)

Lambright filed a motion for rehearing challenging various aspects of this ruling, including the denial of the ineffective assistance claim. The court responded:

> Paragraph a—this issue existed factually prior to appeal; the Arizona Supreme Court looked at the entire sentencing process exhaustively, testing it for error of constitutional dimensions and found none. There is therefore the suggestion, and strong inference, that this claim is precluded under Rule 32.2(a)(2); *however, i[f] not, the Court finds that since it clearly could have been raised on direct appeal, that it has been knowingly, voluntarily and intelligently waived by failure to raise it, and therefore is precluded pursuant to Rule 32.2(a)(c) and (c)* [sic]. . . .

(Minute Entry of 3/4/86; emphasis added.)[1] Lambright's petition for review was denied by the Arizona Supreme Court without comment.

Lambright eventually sought habeas corpus relief. The District Court concluded the claim that he received ineffective assistance through trial counsel's failure to present mental health mitigation evidence had been procedurally defaulted, because the claim was not argued to the Arizona Supreme Court during the direct appeal, and denied relief. *Lambright v. Lewis*, 932 F. Supp. 1547, 1557–64 (D. Ariz. 1996). A grant of relief to Lambright and Smith by the Ninth Circuit panel (because of dual juries used in their joint trial) was overturned by the *en banc* Court, which remanded for consideration of the remaining issues. *Lambright v. Stewart*, 191 F.3d 1181 (9th Cir. 1999).

The panel held that denial of Lambright's claim regarding ineffective assistance at sentencing was erroneous, because the state trial court's preclusion ruling should not have been honored, and remanded to the District Court for an evidentiary hearing on the claim, *Lambright v. Stewart*, 241 F.3d 1201 (9th Cir. 2001), prompting this petition.

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1. "Rule 32.2(a)(c)" is a scrivner's error, intended to refer to Arizona Rule of Criminal Procedure 32.2(a)(3), which then (pre-1992) precluded relief on any claim "Knowingly, voluntarily and intelligently not raised at trial, on appeal, or in any previous collateral proceeding." Rule 32.2(c) provided that, "The court may infer from the petitioner's failure to appeal or to raise an issue on appeal after being advised by the sentencing judge of the necessity that he do so . . . that he knowingly, voluntarily and intelligently relinquished the right to do so."

REASONS WHY THE WRIT SHOULD ISSUE

I

SINCE A PRIMARY AIM OF THE "ADEQUACY" ELEMENT OF THE "ADEQUATE AND INDEPENDENT STATE GROUND" DOCTRINE IS FAIR NOTICE OF PROCEDURAL REQUIREMENTS, THE DEFENSE'S FAILURE TO RAISE INEFFECTIVE ASSISTANCE CLAIMS ON DIRECT APPEAL DESPITE ACTUAL KNOWLEDGE THAT THEY WERE REQUIRED TO DO SO MEANS THE NINTH CIRCUIT ERRED IN HOLDING LAMBRIGHT'S CLAIM CAN BE REVIEWED DESPITE HIS NONCOMPLIANCE WITH THE CLEARLY INDEPENDENT STATE RULE.

The Arizona court ruled Lambright was not entitled to consideration of his claim that his trial attorney had been ineffective during the sentencing phase because that claim should have been presented during the direct appeal, rather than in the subsequent post-conviction relief ("Rule 32") proceeding. The District Court found this ruling an adequate and independent state ground of decision and denied relief. *Lambright v. Lewis*, 932 F. Supp. 1547, 1557–64 (D. Ariz. 1996). The Ninth Circuit disagreed, on the premise that a habeas petitioner is not required to comply with state procedural rules which are so unclear they did not provide him with "a fair opportunity to seek relief in state court." *Lambright v. Stewart*, 241 F.3d 1201, 1203 (9th Cir. 2001), *quoting Morales v. Calderon*, 85 F.3d 1387, 1390 (9th Cir. 1996). It deemed Arizona law insufficiently unclear about whether it actually was necessary to raise ineffective assistance claims during direct appeal, and so concluded Lambright was not bound by the procedural requirement relied upon by the trial court. 241 F.3d at 1203–06.

This ruling conflicts with the adequate and independent state ground doctrine as explained by this Court and understood by other Courts of Appeals, by speculating about hypothetical possibilities for

misunderstanding when the existing record demonstrates that Lambright's counsel *knew* of the requirement that he raise ineffective assistance claims on appeal, but did not. Totally ignored in its abstract discussion of what defendants *might* have understood about whether they were required to raise such claims on direct appeal is the District Court's factual finding: "The appellate lawyer stated in his affidavit that he would have raised ineffectiveness on appeal had he reviewed the record under *Strickland*. This indicates that Lambright's appellate counsel knew that ineffectiveness *could* be raised on direct appeal." *Lambright v. Lewis*, 932 F. Supp. at 1563 (emphasis in original).[2]

Wilful blindness toward the actual facts of the case is not faithfulness to the independent and adequate state ground doctrine. This Court's discussion of the necessity for a "firmly established and regularly followed state practice" in *Ford v. Georgia*, 498 U.S. 411 (1991), makes clear the fundamental concern behind the "adequacy" element is notice to the defendant of what is required of him:

> "Novelty in procedural requirements cannot be permitted to thwart review in this Court applied for by those who, *in justified reliance upon prior decisions*, seek vindication in state court of their federal constitutional rights." *NAACP v. Alabama ex. rel Patterson*, 357 U.S. 449, 457–458 (1958). In the *NAACP* case, we declined to apply a state procedural rule, even though the rule appeared "in retrospect to form part

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2. Arizona traditionally followed the rigorous "farce, shame, or mockery of justice" standard for evaluating ineffective assistance claims. Ten days before Lambright filed his direct appeal brief on October 29, 1982, the Arizona Supreme Court adopted the somewhat less stringent "minimal competence" standard, in *State v. Watson*, 134 Ariz. 1, 4, 653 P.2d 351, 354 (1982). The test from *Strickland v. Washington*, 466 U.S. 668 (1984), was adopted in *State v. Lee*, 142 Ariz. 210, 213–14, 689 P.2d 153, 156–57 (1984), subsequent to the decision in Lambright's appeal. Thus, Lambright's lawyer's statement shows he knew ineffectiveness claims were to be raised on direct appeal, but chose not to, because of the small likelihood of success under the then-current standard of review.

> of a consistent pattern of procedures," *because the defendant in that case could not be "deemed to have been apprised of its existence."* *Id.* at 457.

498 U.S. at 423 (emphasis added). *See also Terrell v. Morris*, 493 U.S. 1, 2 (1989) (petitioner would not be bound by procedural rule announced subsequent to his appeal; he "thus could not have known that he would default his ineffective-assistance claim by his new counsel's failure to raise it on direct appeal"); *Bouie v. City of Columbia*, 378 U.S. 347, 352–54 (1964) ("basic due process concept" of fair warning, which can be lost through vagueness or unforeseeable retroactive application of rules, equated with standard for evaluating whether state procedure is adequate ground to preclude federal review); *Jennings v. Illinois*, 342 U.S. 104, 109–10 and n.9 (1951) (where procedural requirements frequently foreclosed indigents from obtaining transcripts necessary for appeals, held that if no state remedy available, they could proceed in federal habeas. However, state not foreclosed "from showing that any of the petitioners, *in fact, could have obtained review of their claims by writ of error . . .*"); *Cabrera v. Barbo*, 175 F.3d 307, 313 (3rd Cir. 1999) ("The reason for these requirements is that a petitioner should be on notice of how to present his claims in the state courts if his failure to present them is to bar him from advancing them in federal court.").

Several Courts of Appeals recognize that, under *Ford v. Georgia* and this Court's other decisions, proper analysis of contentions that a state procedure is not an adequate ground for denying review requires consideration of the facts of the particular case, rather than the sort of hypothetical, straw-man approach employed by the Ninth Circuit here. *See, e.g., Moore v. Parke*, 148 F.3d 705, 709 (7th Cir. 1998) (federal review of state court decision resting on procedural default is barred "if the petitioner could have known of the procedural requirement and yet still failed to follow it"); *Luberda v. Trippett*, 211 F.3d 1004, 1006–08 (6th Cir. 2000) (rejecting arbitrary "date of conviction rule" for deciding whether changed state procedure which petitioner failed to follow was adequate ground to deny relief; case must be analyzed individually to determine whether petitioner could

be deemed to have been apprised of the requirement); *Hansbrough v. Latta*, 11 F.3d 143, 145–46 (11th Cir. 1994) (procedural requirements insufficient to preclude relief are those "of whose existence the defendant could not reasonably be deemed to have been apprised").

The necessary corollary to *Ford v. Georgia* is that defendants possessing actual knowledge of state procedural requirements do *not* act "justifi[ably]" in ignoring them, and *do* forfeit federal review through noncompliance, regardless of whether those requirements would otherwise constitute an "adequate" state ground. *Henry v. Mississippi*, 379 U.S. 443 (1965), involved a state contemporaneous objection rule. Some question existed whether the purpose of the rule had been fulfilled by a motion following the prosecution case, so that enforcing the rule's specific terms "would serve no substantial state interest [and] settled principles would preclude treating the state ground as adequate." (*Id.* at 448–49.) However, this Court neither resolved that question nor reviewed the substantive claim, because it appeared likely the defense counsel had intentionally foregone objection "and thus that the petitioner should be deemed to have forfeited his state court remedies." (*Id.* at 449–50.) "[C]ounsel's deliberate choice of the strategy would amount to a waiver binding on petitioner and would preclude him from a decision on the merits of his federal claim either in the state courts or here." (*Id.* at 451.) Thus, Lambright's failure to present the ineffective assistance claim on direct appeal, despite his counsel's understanding that it should be so presented, must waive *his* claim, regardless of whether, considered in the abstract, the procedural requirement might be deemed lacking in clarity.

"In a habeas case, moreover, the court [of appeals] must be guided by the general principles underlying our habeas corpus jurisprudence." *Calderon v. Thompson*, 523 U.S. 538, 554 (1998). Habeas corpus is an equitable remedy. *Lonchar v. Thomas*, 517 U.S. 314 (1996). "Application of the 'independent and adequate state ground' doctrine to federal habeas review is based upon equitable considerations of federalism and comity." *Lambrix v. Singletary*, 520 U.S. 518, 523 (1997). "A State's procedural rules are of vital

importance to the orderly administration of its criminal courts; when a federal court permits them to be readily evaded, it undermines the criminal justice system." (*Id.* at 525.) In particular, "Review of the procedural bar and retroactivity issues should be undertaken *based on a correct formulation of the ruling in the District Court*." *Terrell v. Morris*, 492 U.S. at 3 (emphasis added).

A court cannot enforce equity while acting inequitably. In turning a blind eye to the District Court's express finding that Lambright's counsel knew he should raise the ineffective assistance claim on direct appeal and granting relief on the basis of a non-existent state of facts, the Ninth Circuit provided virtually a checklist of the reasons this Court grants certiorari: it decides an important federal question in a way which conflicts with this Court's relevant decisions, such as *Ford v. Georgia*; its decision conflicts with decisions of other circuits; and its decision so departs from the "accepted and usual course of judicial proceedings," particularly the equitable principles which govern habeas corpus proceedings, as to call for an exercise of this Court's supervisory jurisdiction. Supreme Court Rule 10. Certiorari certainly should be granted in this case.

II

THE REQUIREMENT TO RAISE INEFFECTIVE ASSISTANCE CLAIMS ON DIRECT APPEAL WAS CLEAR ENOUGH FROM RULES OF COURT AS WELL AS CONSISTENT ARIZONA JUDICIAL DECISIONS TO BIND LAMBRIGHT AND THE COURT OF APPEALS.

The Ninth Circuit holds that Lambright's failure to raise the ineffective assistance claim on direct appeal is not an adequate default to bar federal review:

> Since Lambright's ineffective assistance of counsel claim required factual development, Rule 32.2 did not clearly require that he raise it on appeal. In fact, Arizona's

> procedural rules required that he wait until state postconviction proceedings to raise it.

241 F.3d at 1204.

A. RULES ADEQUATE TO PREVENT FEDERAL REVIEW CAN BE ESTABLISHED WITHOUT JUDICIAL DECISIONS.

The validity of the holding above depends on the accuracy of its assessment of Arizona law, particularly the content of Rule 32.2: did Arizona really require waiting until a post-conviction proceeding to litigate ineffective assistance claims, or did it demand presentation of such claims in the direct appeal? In fact, the Court of Appeals' characterization of appeal and Rule 32 proceedings as mutually exclusive and always sequential to one another does not portray the Arizona remedial scheme accurately. Arizona procedural rules *did* demand presentation of ineffective trial counsel claims during direct appeal, and legitimately so, provision having been made for record amplification when necessary.

The Ninth Circuit reached its mistaken conclusion about these procedures through a fundamentally flawed analysis which places it in conflict with other courts. First, it fails to recognize the mandatory character of the state preclusion rule. Its statement that, "At the time of Lambright's alleged default, Rule 32.2 provided that 'any ground' '[k]nowingly, voluntarily and intelligently not raised at trial, on appeal, or in any previous collateral proceeding' could be considered waived" (241 F.3d at 1204), only partially quotes Rule 32.2(a), Ariz. R. Crim. P., and seriously distorts the rule. The rule does *not* say that such unraised grounds "could be" considered waived—a formulation suggesting discretion and room for inconsistency. Rather, Rule 32.2(a) bluntly directs, "A petitioner will not be given relief under this rule based upon any ground," within the then-listed categories of prohibited claims. This plain imperative that all claims be raised as early as possible, and that failure to do so shall constitute waiver, contains no exception for ineffective assistance claims.

Aside from its disregard of the mandatory nature of Rule 32.2 preclusion, the Ninth Circuit's reason for finding Arizona's procedures insufficiently clear and well-established to prevent federal review is both simple and simply wrong: "No Arizona case at the time of Lambright's purported default required the defendant to raise an ineffective assistance of counsel claim on appeal." 241 F.3d at 1203. However, no authority from this Court or any other source was offered for the bizarre (not to say arrogant) notion that rules cannot be established by rules, but only by judicial decisions. This Court evidently believes otherwise. For example, in *Hathorn v. Lovorn*, 457 U.S. 255, 263 n.13 (1982), the Court noted that continued existence of a Mississippi procedural bar was unclear because, "Neither the Mississippi Code nor the Rules of the Supreme Court of Mississippi embody the alleged prohibition . . ."—an omission of no moment if only opinions are capable of setting up requirements restricting federal review.

The Ninth Circuit's statement also clearly puts it at odds with other Courts of Appeals. "As a general matter, whenever a procedural rule is derived from state statutes and supreme court rules, as this one is, the rule is necessarily 'firmly established'." *O'Dell v. Netherland*, 95 F.3d 1214, 1241 (4th Cir. 1996), *aff'd on other grounds*, 521 U.S. 151 (1997). *See also Luberda v. Trippett*, 211 F.3d at 1008 (treating new Michigan rule as sufficient to require compliance immediately upon promulgation). Moreover, an unambiguous black-letter rule is "firmly established" and adequate to prevent federal review, even if the state courts have not had occasion to apply it to facts like those in a habeas petitioner's case. *Yeatts v. Angelone*, 166 F.3d 255, 264 (4th Cir. 1999).

Particularly troubling about the holding here, that a state rule is not "adequate" unless expressed in a judicial decision applying it to a similar issue, is that it even contradicts Ninth Circuit law. Two years before *Lambright* another panel of that court stated emphatically:

> We do not read decisions from this Court or the Supreme Court as requiring a state court to locate a case law citation that speaks to the very same factual scenario as the one before it prior to invoking the rule of procedural default. Instead, we follow the Supreme Court's dictate that where a rule is sufficiently clear to put a petitioner on notice that he must raise all claims or risk default, that petitioner must raise all claims. *See Coleman*, 501 U.S. 722. We conclude in this case that petitioner cannot shirk his duty under Nevada law to raise all claims presented to the trial court to an appellate court simply because there is no reported case directly on point. . . . We decline the invitation of the dissent to require a state court to articulate every permutation of every rule before it can invoke procedural default—such a rigid construct of the procedural default doctrine frustrates its purpose and impairs our system of federalism.

Bargas v. Burns, 179 F.3d 1207, 1212–13 (9th Cir. 1999). *Lambright* does not even mention *Bargas*, let alone attempt to reconcile it. Thus, the Court of Appeals managed to ignore and contradict every possible source of guidance about the sufficiency of the Arizona preclusion rule.

Moreover, the requirement to raise all claims on appeal was not obviated by the possibility that allegations of ineffectiveness might involve matters outside the trial record. Arizona Rule of Criminal Procedure 31.4 (not mentioned by the opinion) authorized staying an appeal pending resolution of a Rule 32 petition and consolidating review of the complete petition with the appeal. The Comment to Rule 31.4 explains:

> Under Rule 32.1 a party may file a petition for post-conviction relief at any time subject to Rule 32.2, which precludes the filing of a petition based on any issue still raisable on appeal or in a Rule 24 post-trial motion. In effect, *during the pendency of an appeal, a Rule 32 petition is available* only after perfection of the appeal and only *to raise issues not still*

> *raisable on appeal, such as those for which there is no record.* Thus, it is possible that proceedings may be pending in both the trial and appellate courts.

(Emphasis added.) In other words, contrary to the Ninth Circuit's belief that a need to develop additional facts is inherently inconsistent with requiring that ineffectiveness claims be raised during direct appeal, the black-letter Arizona rules expressly anticipated that when claims needing factual development surfaced during appeal, the Rule 31.4 stay procedure would be employed, permitting efficient appellate consideration of all claims in a single consolidated appeal.

In sum, the Ninth Circuit decision is based upon an obvious misconstruction of what it means for a procedural rule to be "clearly established" and therefore adequate to prevent federal review, in conflict with opinions of this Court, of other circuits, and even of itself. Such confusion calls out for certiorari and resolution.

B. ARIZONA DECISIONS DO NOT RENDER THE RULE UNCLEAR.

It is possible for an otherwise clear rule to become ambiguous through inconsistent state court application, and hence inadequate to prevent federal review, a concept invoked by the Ninth Circuit. See 241 F.3d at 1203–04. However, the Court of Appeals' position that that has occurred to this Arizona rule is wholly unacceptable. First, it effectively rejects *Stewart v. LeGrand*, 526 U.S. 115 (1999). This Court denied relief in that capital case, stating, "The Arizona court held that Walter LeGrand's *ineffective-assistance arguments* were barred pursuant to a state procedural rule, and Walter LeGrand has failed to demonstrate cause or prejudice for his failure *to raise these claims on direct appeal*." (*Id.* at 120, citing Superior Court post-conviction relief proceeding minute entry; emphasis added.) Since this Court found adequate precisely the same rule the Ninth Circuit refused to apply to Lambright, and the Ninth Circuit pointed to no intervening Arizona Supreme Court decisions undermining application of the rule, the Court of Appeals has "decided an important federal

question in a way that conflicts with relevant decisions of this Court," warranting certiorari. Supreme Court Rule 10(c).

Next, *Lambright* even contradicts Ninth Circuit cases which uphold application of this same preclusionary rule. *Carriger v. Lewis*, 971 F.2d 329 (9th Cir. 1992) (*en banc*), found ineffective assistance claims not raised during direct appeal to be procedurally defaulted. 971 F.2d at 333–34. The *Lambright* panel attempts to distinguish *Carriger* (241 F.3d at 1204 n.3), but *Carriger* expressly rejected a contention indistinguishable from the *Lambright* court's view, "that Arizona's reliance on his procedural default was so unpredictable and irregular that it does not provide an adequate ground for disposal of his claims." 971 F.2d at 333. Indeed, the *Carriger* dissent is replete with arguments identical to the panel's position here: that holding ineffectiveness claims waived when not raised on direct appeal "is irreconcilable with our law that when . . . claims of ineffective assistance of counsel depend on matters not apparent in the trial record, the appropriate place to develop them is on collateral review and not on direct appeal" (*id.* at 337); that "Arizona itself does not generally apply Rule 32 waiver as harshly as in this case, but usually limits waiver to the claims that are apparent in the trial record" (*id.* at 339); and that there should be "no procedural bar to federal court consideration of the claims [where] the state court's reliance on an independent and adequate procedural bar was unclear." *Id.* The *Carriger* majority opinion, by an *en banc* court, implicitly rejects all these contentions and should have been accepted as controlling. In refusing to follow either *Carriger* or *LaGrand*, the *Lambright* panel "has so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's supervisory power." Supreme Court Rule 10(a).

Finally, that the *Lambright* panel was aware of (but disobeyed) *Carriger v. Lewis* is significant in another way. The Ninth Circuit purported to survey Arizona decisions and find therein a "requirement" that ineffective assistance claims be presented in Rule 32 proceedings, rather than direct appeals. 241 F.3d at 1203–04. However, it completely ignores *State v. Carriger*, 143 Ariz. 142, 692

P.2d 991 (1984). After comprehensively comparing direct appeals and Rule 32 proceedings, the Arizona Supreme Court concluded, "***Important policy considerations require that all claims be raised in the appeal.***" 143 Ariz. at 145–46, 692 P.2d at 994–95 (emphasis added). The decision twice refers to "the necessity of raising competency of counsel issues on appeal" as something Carriger was aware of in *1978*. 143 Ariz. at 146, 692 P.2d at 995. Thus, the necessity to raise such claims on direct appeal was known long before Lambright's appeal.[3]

Carriger cites *State v. Herrera*, 121 Ariz. 12, 14, 588 P.2d 305, 307 (1978), which held a defendant who received the required information about his appeal rights but did not appeal could properly be inferred, pursuant to Rule 32.2, to have knowingly waived his right to an appeal. The following year the Arizona Court of Appeals cited *Herrera* for the proposition that, "Rule 32.2 provides that the trial court may infer from the lack of appeal that the petitioner knowingly, voluntarily and intentionally relinquished *any right to raise issues in connection with his original conviction.*" *State v. Salazar*, 122 Ariz. 404, 406, 595 P.2d 196, 198 (App. 1979) (emphasis added). Thus, the failure to raise a claim on appeal which could have been raised *was* understood by the Arizona legal community to default such claims in subsequent Rule 32's.

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3. The Ninth Circuit dismissed as irrelevant all cases decided after Lambright's appeal (241 F.3d at 1203 n.2), but such disregard is arbitrary and injudicious. *State v. Carriger*'s purpose was to summarize how appeals and Rule 32's had interrelated since the Rule was adopted in the early 1970's, not to announce a novel interpretation invented in the months since *Lambright* was decided. Courts are presumed to speak the truth about what they have done. *Parker v. Dugger*, 498 U.S. 308, 314 (1991). Mississippi decisions were accepted as accurately describing state practice prior to their announcement. *Hathorn v. Lavorn*, 457 U.S. at 263. Therefore, what Arizona courts have said about how Rule 32 was applied prior to Lambright's appeal is relevant and reliable evidence of the state of the law at that time.

Understanding the Rule 31.4 stay provision discussed earlier also casts a very different light on cases the Ninth Circuit relied upon as support for its conception that ineffective assistance claims must be reserved for post-appeal Rule 32 proceedings. Although *State v. Valdez*, 160 Ariz. 9, 14–15, 770 P.2d 313, 318–19 (1989), and *State v. Carver*, 160 Ariz. 167, 175, 771 P.2d 1382, 1390 (1989), reemphasized the necessity for a factual basis for ineffective assistance claims, they show that a Rule 32 petition to expand the record on such claims was conducted in the context of the direct appeal, *not* as an independent proceeding following its completion. *Krone v. Hotham*, 181 Ariz. 364, 890 P.2d 1149 (1995), is not "clarification" of a previously ambiguous requirement that ineffectiveness claims be held back for a post-appeal Rule 32; instead (a dozen years after Lambright's appeal was decided), it marked a complete change of direction by the Arizona Supreme Court. Although previously that court had "routinely stayed appeals pending resolution of Rule 32 proceedings . . . that practice proved unworkable and resulted in long delays;" therefore, in 1992, it promulgated rule changes requiring automatic initiation of Rule 32's upon completion of direct appeals in capital cases, and announced that, "Now, we will almost never allow a Rule 32 proceeding to delay a direct appeal." 181 Ariz. at 365–66, 890 P.2d at 1150–51.[4]

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4. Thus, before Lambright's appeal the regular practice was to raise ineffective assistance claims on direct appeal in capital cases, to be disposed of on the existing record. *See, e.g., State v. Carriger*, 123 Ariz. 335, 337–38, 599 P.2d 788, 790–91 (1979); *State v. Tison*, 129 Ariz. 546, 556, 633 P.2d 355, 365 (1981); *State v. Britson*, 130 Ariz. 380, 382–84, 636 P.2d 628, 630–32 (1981); *State v. Navarre*, 132 Ariz. 480, 484–85, 647 P.2d 178, 182–83 (1982). It also was common to provide for mid-appeal expansion of the record, without deviating from the requirement that ineffectiveness be *raised* on the direct appeal. *Krone*'s example of the prior "routine" practice of staying appeals while Rule 32's were pending is *State v. Vickers*, 180 Ariz. 521, 885 P.2d 1086 (1994), a capital case involving ineffectiveness claims. *See also State v. Kruchten*, 101 Ariz. 186, 189, 417 P.2d 510, 513 (1966); *State v. Watson*, 114 Ariz. 1, 14–15, 559 P.2d 121, 134–35 (1976); *State v. Zuck*, 134 Ariz. 509, 515–16, 658 P.2d 162 (1982);

(continued...)

Much is made of *State v. Bell*, 23 Ariz. App. 169, 531 P.2d 545 (1975), which says that one purpose of Rule 32 proceedings is to expand the record, so that preclusion extends only to matters for which there was a sufficient factual basis to decide the claim. *Lambright*, 241 F.3d at 1204. However, *Bell* did not relieve defendants of the requirement to *raise* the claim during the appeal in the first place; the panel overlooks that *Bell* remanded for a Rule 32 hearing while staying the appeal in which the ineffectiveness claim had been raised, and then completed consideration of the appeal. *State v. Bell*, 24 Ariz. App. 526, 540 P.2d 145 (1975). Similarly, in *State v. Scrivner*, 132 Ariz. 52, 54, 643 P.2d 1022, 1024 (Ariz. App. 1982), the appellate court had made provision for the defendant to expand the record *in order to argue ineffective assistance on direct appeal*, by granting him new counsel. Therefore, when in a post-appeal Rule 32 Scrivner only presented claims that could have been argued from the original record, the claims were precluded, because not raised in the original appeal. Thus, the Arizona decisions refute rather than support the Ninth Circuit.

The fact of the matter, as found by the District Court, was that "Lambright was provided a real and meaningful opportunity to make his ineffectiveness claim on direct appeal. The opportunity was not so ill-defined as to justify excusing Lambright's failure." *Lambright v. Lewis*, 932 F. Supp. at 1562. Arizona's rule requiring ineffective assistance claims to be raised on direct appeal was sufficiently clear, and the mischief which will be created by permitting the Ninth Circuit's deviant analysis to stand pleads for certiorari.

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4. (...continued)
State v. Ellis, 117 Ariz. 329, 334, 572 P.2d 791, 796 (1977); and *State v. Rogers*, 113 Ariz. 6, 545 P.2d 930 (1976).

III

THE NINTH CIRCUIT MISUNDERSTOOD *HARRIS v. REED* IN FAILING TO RECOGNIZE THAT THE ORDER DENYING RECONSIDERATION WAS NOT AMBIGUOUS AT ALL, JUST A COMMON ALTERNATIVE DEFAULT AND MERITS RULING, BUT IF THERE WAS AMBIGUITY, THE COURT OF APPEALS ABDICATED ITS DUTY TO EXAMINE THE FULL STATE COURT RECORD TO ATTEMPT TO RESOLVE THE TRUE INTENT OF THE RULING.

When Lambright sought review of the denial of his post-conviction relief petition the Arizona Supreme Court denied review without comment. Therefore, to determine the scope of the issues preserved for federal habeas corpus review, it was necessary to "look through" that unspecific ruling to the last reasoned determination, the ruling of the trial court. *Ylst v. Nunnemaker*, 501 U.S. 797 (1991). In rejecting Lambright's motion for reconsideration of its prior denial of relief, the trial court stated:

> Paragraph a—this issue existed factually prior to appeal; the Arizona Supreme Court looked at the entire sentencing process exhaustively, testing it for error of constitutional dimensions and found none. There is therefore the suggestion, and strong inference, that this claim is precluded under Rule 32.2(a)(2); *however, i[f] not, the Court finds that since it clearly could have been raised on direct appeal, that it has been knowingly, voluntarily and intelligently waived by failure to raise it, and therefore is precluded pursuant to Rule 32.2(a)([3]) and (c) . . . .*

(Minute Entry of 3/4/86; emphasis added.)

The Ninth Circuit overruled the District Court's acceptance of the procedural default ruling, stating:

> The last reasoned opinion on Lambright's ineffective assistance of counsel [claim] did not clearly invoke a procedural default rule and therefore does not bar federal review. It is well established that "a procedural default does not bar consideration of a federal claim on either direct or habeas review unless the last state court rendering a judgment in the case clearly and expressly states that its judgment rests on a state procedural bar." *Harris v. Reed*, 489 U.S. 255, 263 [(1989)]. Indeed, "a procedural default based on an ambiguous order that does not clearly rest on an independent and adequate state ground is not sufficient to preclude federal collateral review." *Morales v. Calderon*, 85 F.3d [1387,] 1392 [(9th Cir. 1996)].

241 F.3d at 1205.

The Court of Appeals took the *Harris* language out of context in precisely the same way that was condemned in *Coleman v. Thompson*, 501 U.S. at 735–36, by distorting the predicate required before federal courts may presume there was no adequate and independent state ground of decision. "The presumption at present applies only when it fairly appears that a state court judgment rested primarily on federal law or was interwoven with federal law, that is, in those cases where a federal court has good reason to question whether there is an independent and adequate state ground for decision." 501 U.S. at 739. This Court's formulation places the burden on the *challenger* of an alleged independent state ground (whether petitioner or court) to show it "fairly appears" the state court judgment rested *primarily on federal law* before the state-law basis for the ruling can be overlooked.

Whatever else may be said about the ruling here at issue, it certainly does *not* "fairly appear" to rest primarily on federal law. Moreover, both here and in *Morales* the Ninth Circuit turned this Court's rule upside-down, shifting the burden onto the *custodians* to show that the state court ruling "clearly rests" on *state* grounds. Thus, we have a series of holdings on an important federal question,

not merely conflicting with but directly contrary to "relevant decisions of this Court"—a compelling basis for granting certiorari.

Moreover, even aside from this illegitimate revision of the *Harris/Coleman* doctrine, the Court of Appeals blatantly misapplied *Harris*. This Court found the state court ruling in that case insufficiently clear because it merely mentioned that claims "could have been raised on direct appeal" without explicitly relying on a state-law procedural ground and went on to reject them on their merits. However, this Court reassured everyone that the adequate and independent state ground doctrine requires federal courts to honor state-law holdings "even when the state court also relies on federal law" (489 U.S. at 264 n.10), so that conjoined alternative state and federal grounds provide no basis for federal review. The Court even specified that "a state court that wishes to rely on a procedural bar rule in a one-line *pro forma* order easily can write that 'relief is denied for reasons of procedural default'." *Harris v. Reed*, 489 U.S. 255, 265 n.12 (1989).

The trial court here did exactly what this Court indicated in *Harris* would be sufficient to insulate its ruling from federal review. Although adverting to the possibility that the claim might have been silently reviewed by the Arizona Supreme Court, it specifically found not only that the ineffective assistance issue could have been raised on direct appeal but also that, "it has been knowingly, voluntarily and intelligently waived by the failure to raise it, and therefore is precluded pursuant to Rule 32.2(a)([3]) and (c)."

The trial court's statement did all that has been required by this Court. With commendable realism this Court has recognized that overburdened state courts may sometimes neglect to furnish as clear a statement of reliance on state procedural grounds as might be desirable, but has refused to impose a style manual on the state judiciary. *Coleman v. Thompson*, 501 U.S. at 738–39. Thus, although the Virginia Supreme Court's reference to consideration of all the papers filed in the case added "some ambiguity," this Court refused to read it "as overriding the court's explicit grant of a

dismissal motion based solely on procedural grounds," and therefore found the grounds independent of federal law. 501 U.S. at 744.

As demonstrated by *Coleman* and Court of Appeals decisions finding other state court rulings adequate to bar federal review, the trial court's ruling denying reconsideration in this case, even considered in isolation, should have been accepted. *See, e.g., Tejada v. Dugger*, 941 F.2d 1551, 1558 (11th Cir. 1991) ("this issue could have raised at the time of trial and on direct appeal, but was not, and review is therefore precluded" sufficient, despite additional merits discussion); *Pelmer v. White*, 877 F.2d 1518, 1520 (11th Cir. 1989) (statement of procedural ground sufficient, although state court added, "even assuming the claim is valid," it would be denied on merits); *Cabrera v. Barbo*, 175 F.3d at 312–14 (state appellate court's addition of merits ruling to affirmance of trial court's denial of relief on procedural ground did not render procedural ground inadequate); *Scott v. Mitchell*, 209 F.3d 854, 864–67 (6th Cir. 2000) (where state supreme court said "appellant neglected to object to the trial court's instruction in this regard and has accordingly waived any objections," that it also said that, "More importantly," the issue lacked merit did not render inadequate the procedural ruling, which barred federal review); *McBee v. Abramajtys*, 929 F.2d 264, 266–67 (6th Cir. 1991) (statement there was no reversible error "because defendant did not object to the instruction" sufficient reliance on independent state ground, even when coupled with discussion of claim's lack of merit). The Ninth Circuit's failure to accept the ruling illuminates its misunderstanding of the applicable standard, and its conflict with the other circuits.

Coleman v. Thompson also states:

> We encourage state courts to express plainly, in every decision potentially subject to federal review, the grounds upon which their judgments rest, but we will not impose on state courts the responsibility for using particular language in every case in which a state prisoner presents a federal claim—every state appeal, every denial of state collateral review—in order that

> federal courts might not be bothered with reviewing state law and the record in the case.

501 U.S. at 739.

This duty of federal courts to review "the record of the case" in order to ascertain the true import of state court rulings they perceive as ambiguous is particularly pertinent to this case. In purported reliance upon *Ylst v. Nunnemaker*, the Ninth Circuit insisted that *only* the ruling on denial of rehearing could be considered, finding that the District Court had erred in taking account of the trial court's original ruling denying post-conviction relief. 241 F.3d at 1205. Thus, even while characterizing the order denying rehearing as unclear, the Court of Appeals intentionally forewent clarification readily available elsewhere in "the record of the case." The trial court's first ruling, like the second, alludes alternatively to procedural and merits grounds for denying relief, but does so with somewhat greater clarity and distinction:

> The ineffective[ness] claim is not a colorable claim. The lengthy recitations in the petition when studied and reviewed against the reality [of] the trial represent merely another lawyer's guess at how witnesses should have been or might have been examined and perhaps how different tactics might have been used, all with the clarity of 20-20 hindsight. The trial court heard the motions as well as the trial and could not in good conscience find a genuine effectiveness argument. *In addition, this case was appealed on behalf of Mr. Lambright by an experienced criminal appellate attorney, not the trial attorney, who examined the entire record and transcript and failed to raise the issue on appeal, a knowing, voluntary, and intelligent waiver; therefore the defendant is precluded under Rule 32.2(a)(3)*, and the court finds that there is in fact no colorable claim of ineffectiveness.

(Minute Entry of 4/17/85; emphasis added.)

Using *Ylst* as an excuse to avoid consideration of plainly relevant material was error. In *Ylst* this Court authorized looking through a silent state supreme court order to an explained lower court order; it did *not* authorize a habeas court to ignore an earlier explained order, on the same subject matter, in the same case, by the same state court, especially when the habeas court expresses doubt about the intent of the last explained order. The Court's concern for the *accuracy* of federal courts' handling of state court rulings demands that they consider circumstances surrounding the state court orders which could contribute to that accuracy. *Ylst*, 501 U.S. at 802–05. We have already seen that *Coleman v. Thompson* affirms the duty of federal courts to review pertinent parts of the record of the case in assessing alleged procedural bars when the state court has failed to utilize some talismanic phrase to indicate what it has done. 501 U.S. at 739. *See also Fisher v. Angelone*, 163 F.3d 835, 846 (4th Cir. 1998) ("Although the Bedford Circuit Court never explicitly stated the ground for denying Fisher's motion to amend, the record as a whole points to a procedural resolution of the claim."). Therefore, ignoring anything relevant to the meaning of the supposedly ambiguous final order of the trial court, especially its initial denial order, violates *Ylst* and *Coleman*.

The Ninth Circuit certainly misapplied not only *Harris v. Reed* but *Ylst* and *Coleman* in order to avoid crediting the state court's procedural ruling. Certiorari should therefore be granted. Supreme Court Rule 10(a), (c).

CONCLUSION

Based on the foregoing authorities and arguments, Petitioners respectfully request that this Court grant the petition for writ of certiorari, vacate the Court of Appeals' decision, and affirm the District Court's denial of all relief to Lambright.

Respectfully submitted,

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APPENDIX A

[241 F.3d 1201]
JOE LEONARD LAMBRIGHT,
Petitioner-Appellant,

v.

TERRY STEWART, Director, Arizona Department of Corrections,
Respondent-Appellee.

No. 96-99020

United States Court of Appeals,
Ninth Circuit

Argued and Submitted Aug. 17, 2000
Filed March 6, 2001

David P. Tiers, Tucson, Arizona for the Petitioner-Appellant.

Scott A. Bales, Solicitor General, Phoenix, Arizona, for the Respondent-Appellee.

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Appeal from the United States District Court for the District of Arizona; Richard M. Bilby, Chief Judge, Presiding, D.C. No. CV-87-235-TUC-RMB.

Before: FERGUSON, REINHARDT, and DAVID R. THOMPSON, Circuit Judges.

FERGUSON, Circuit Judge:

Joe Leonard Lambright ("Lambright") appeals the district court's procedural dismissal of his ineffective assistance of counsel claim. We conclude that the district court incorrectly found that the state court's order dismissing Lambright's claim rested on an independent and adequate state ground. Because he has presented a colorable claim to relief and has not received a hearing, we order an evidentiary hearing in the district court.

I.

On March 30, 1982, Lambright and co-defendant Robert Douglas Smith were convicted of first degree murder, sexual assault, and kidnapping.[1] Lambright's former girlfriend and accomplice, Kathy Foreman ("Foreman"), agreed to testify as the State's main witness pursuant to an immunity agreement. The State sought the death penalty.

The mitigation that Lambright's lawyer offered at sentencing comprises less than three pages of a double-spaced transcript. Although there were signs at the time that Lambright suffered from a mental illness, his counsel failed to present any mitigating psychiatric testimony. Instead, the attorney promised the court that he had "one witness who will be very brief." He then called a correction officer from the Pima County Jail, who had known Lambright for just six months. The officer testified that he personally had no "problems with him as an inmate" and knew of no "compliants made by other inmates." When

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the lawyer finished questioning the detention officer, he turned to the court and announced, "[y]our Honor, we have nothing more to put forward at this time. Thank you."

In his closing argument, Lambright's lawyer offered two reasons for sparing his client from execution. First, in the lawyer's words, Foreman "was a co-defendant and co-conspirator in everything but the

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1. Because we described the facts of the offense in detail in our en banc opinion, we do not repeat them. *See Lambright v. Stewart*, 191 F.3d 1181, 1182-83 (9th Cir. 1999) (en banc).

charge made by the county attorney. I think it's a circumstances [sic] this Court has to consider." Second, as the lawyer explained, "I submit there is a prior forgery or some such crime in Louisiana sometime ago. The record presented shows a man, but for this instance, with no violent background."

On the day of sentencing, the court offered Lambright's lawyer another opportunity to argue on his client's behalf. The lawyer responded, "I made the argument at the mitigation hearing held prior to this date. Thank-you." The court then sentenced Lambright to death after finding the existence of a single aggravating factor: that the murder had been committed in an especially heinous, cruel, or depraved manner.

II.

Lambright raised an ineffective assistance of counsel claim in his first petition for postconviction relief. The district court held that he had procedurally defaulted the claim under Arizona Rule of Criminal Procedure 32.2 ("Rule 32.2") by failing to raise it on direct appeal. We conclude that the rule requiring Lambright to raise his ineffective assistance of counsel claim on appeal does not bar federal habeas review because it was "so unclear that it d[id] not provide the habeas petitioner with a fair opportunity to seek relief in state court." *Morales v. Calderon*, 85F.3d 1387, 1390 (9th Cir. 1996) (internal quotation marks omitted).

"In order to constitute adequate and independent grounds sufficient to support a finding of procedural default, a state rule must be *clear*, consistently applied, and *well-established* at the time of petitioner's purported default." *Wells v. Maass*, 28 F.3d 1005, 1010 (9th Cir. 1994) (emphasis added); see also *Ford v. Georgia*, 498 U.S. 411, 423-24, 111 S. Ct. 850, 112 L.Ed.2d 935 (1991). No Arizona case at the time of Lambright's purported default required the defendant to raise an ineffective assistance of counsel claim on appeal.

The State relies on *State v. Zuck*, 134 Ariz. 509, 658 P.2d 162 (1982), to support its contention that such a rule existed, but its

reliance is misplaced.[2] In *Zuck*, the appellant raised an ineffectiveness claim on appeal and the Arizona Supreme Court remanded for a hearing on the issue. *Id.* at 168. In so doing, the court remarked that, "*when the issue* of competency of trial counsel *has been raised*, we have always resolved the matter with whatever was before us in the record and without giving trial counsel an opportunity to be heard. However, we believe that in some cases *where this issue is raised*, it would be appropriate to remand the case for a hearing on the question." *Id.* (emphasis added). The court's description of its approach to cases in which appellants *did* raise an ineffective assistance of counsel claim on appeal falls far short from a clear rule requiring all appellants to do so. Thus, contrary to the State's assertion, *Zuck* does not contain a clear rule requiring ineffectiveness claims to be raised on appeal.

Significantly, the Arizona Supreme Court has since clarified that "[a]s a general rule, ineffective assistance of counsel claims should be raised in post-conviction relief proceedings pursuant to Rule 32, Arizona Rules of Criminal Procedure." State

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v. Atwood, 171 Ariz. 576, 832 P.2d 593, 616 (1992), see also *Krone v. State*, 181 Ariz. 364, 890 P.2d 1149, 1151 (1995) ("We continue to commend the Rule 32 process to resolve claims of ineffective assistance of counsel."); *State v. Carver*, 160 Ariz. 167, 771 P.2d 1382, 1390 (1989). In *State v. Valdez*, 160 Ariz. 9, 770 P.2d 313, 318 (1989), for example, the Arizona Supreme Court explained that, "if the defendant wishes to raise an ineffective assistance of counsel issue, he should ordinarily begin someplace other than in this court." It so held because "this court is reluctant to decide claims of ineffective assistance in advance of an evidentiary hearing to determine the reasons for counsel's actions or inactions on any particular point." *Id.*

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2. The State also relies on cases that the Arizona Supreme Court decided after Lambright's appeal. Obviously, these cases are not relevant in determining whether the rule the State claims existed was sufficiently clear or well-established at the time of Lambright's alleged default to bar federal review.

To prove that Lambright defaulted his Sixth Amendment claim by failing to raise it on appeal, the State alternatively relies on Rule 32.2's general procedural default rule.[3] At the time of Lambright's alleged default, Rule 32.2 provided that "any ground" "[k]nowingly, voluntarily and intelligently not raised at trial, on appeal, or in any previous collateral proceeding" could be considered waived. It was well-established, however, that an appellant could not raise any issue outside of the trial record. *See State v. Pearson*, 98 Ariz. 133, 402 P.2d 557, 559 (1965) (refusing to consider affidavit in support of claim "being of the view that they are not properly raised in this Court"); *State v. Lindsay*, 5 Ariz. App. 516, 428 P.2d 691(Ct. App. 1967) ("The record before this Court is very meager, and it has been stated repeatedly that the appellate court will consider and review only those matters which appear in the record before it and will not consider those matters not properly supported by the record.") (citations omitted). As one Arizona court explained:

> Rule 32 has as its aim the establishment of proceedings to determine the facts underlying a defendant's claim for relief when such facts are not otherwise available. . . . When Rule 32.2 is viewed with this aim in mind, we are of the opinion that the preclusion of post-conviction relief under this rule on the ground that the matter is still raisable on direct appeal applies only to those matters in which a sufficient factual basis exists in the record for the appellate court to resolve the matter.

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3. In *Poland v. Stewart*, 169 F.3d 573, 579 (9th Cir. 1999), and *Carriger v. Lewis*, 971 F.2d 329 (9th Cir. 1992) (en banc), we rejected both the contention that the state court orders, finding that the petitioners had defaulted their claims of ineffective assistance of counsel on appeal, constituted a decision on the merits and the broad assertion that all of Arizona's default rules are inconsistently applied. We were not, however, faced with the same challenge we confronted here: that the particular procedural default rule the sate court relied on was insufficiently clear, in light of the rule prohibiting claims that relied on evidence outside the record from being raised on appeal, to bar federal review. Therefore, *Poland* and *Carriger* do not control.

State v. Bell, 23 Ariz. App. 169, 531 P.2d 545 (Ct. App. 1975). Indeed, in *State v. Scrivner*, 132 Ariz. 52, 643 P.2d 1022, 1024 (Ct. App. 1982), the court specifically distinguished between ineffective assistance claims "based on the record," which were subject to waiver on appeal, and those that had an "apparent necessity for the development of these matters by further factual hearings."

In this first Rule 32 petition, Lambright alleged that his attorney failed to investigate or present evidence of his mental disability and social history. Of course, neither the evidence of counsel's deficiencies nor the prejudice cased therefrom appeared in the trial records. Since Lambright's ineffective assistance of counsel claim required factual development, Rule 32.2 did not clearly require that he raise it on appeal. In fact, Arizona's procedural rules required that he wait until state postconviction proceedings to raise it. Thus, the procedural default in this case is inadequate to bar federal review. See *McGregor v. Gibson*, 219 F.3d 1245, 1252-53 (10th Cir. 2000) (concluding that state procedural bar, based on petitioner's failure to raise ineffectiveness claim on direct appeal, was inadequate to preclude federal

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habeas review because "that information would have been outside the trial record").[4]

Moreover, even if such a procedural rule clearly existed at the time of Lambright's direct appeal, the state court's order in this case does not "clearly and expressly" rest on such a rule. "Thus, the Arizona court did not rely on an independent state ground so as to bar federal habeas review. The district court incorrectly based its conclusion that it could not consider Lambright's constitutional claim on the state court's first, rather than last, reasoned opinion on Lambright's ineffective assistance of counsel claim. To determine

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4. Because the rule that the district court applied in this case was insufficiently clear to bar federal review, we need not determine whether a state procedural rule requiring a habeas petitioner to raise an ineffectiveness claim on appeal, which at the same time precludes him from referring to evidence outside of the record to make the necessary showing under *Strickland*, violates the Due Process Clause.

whether a state procedural ruling bars federal review, we look to the "last reasoned opinion on the claim." *Ylst v. Nunnemaker*, 501 U.S. 797, 804, 111 S. Ct. 2590, 115 L.Ed.2d 706 (1991). We do so because, "[s]tate procedural bars are not immortal . . .'; they may expire because of later actions by state courts." *Id.* at 801, 111 S. Ct. 2590.

The last reasoned opinion on Lambright's Sixth Amendment claim is the state trial court's Order denying rehearing on is first state post-conviction petition. In the order, the court wrote:

> Ineffective assistance of counsel.
>
> Paragraph a—this issue existed factually prior to appeal; the Arizona Supreme Court looked at the entire sentencing process exhaustively, testing it for error of constitutional dimensions and found none. There is therefore the suggestion, and strong inference, that this claim is precluded under Rule 32.2(a)(2); however, it [sic] not, the Court finds that since it clearly could have been raised on direct appeal, that it has been knowingly, voluntarily and intelligently waived by failure to raise it, and is therefore precluded pursuant to Rule 32(a)(c) and (c).

By stating that there was a "strong inference" that the claim was "precluded" under Rule 32.2(a)(2), the state court indicated that it believed that the Arizona Supreme Court had already rejected it on the merits, which prevented Lambright from further litigating the claim.[5] In the next part of the order, however, the court suggested a contradictory possibility: that Lambright had failed to raise the claim before and had therefore waived it under Rule 32.2(a)(3).

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5. As quoted above, Arizona's waiver or procedural default rule is set forth in Rule 32.2(a)(3), which provides that, "[a] petitioner will not be given relief under this rule based upon any ground: . . . (3) knowingly, voluntarily, and intelligently not raised at trial, on appeal, or in any previous collateral proceeding." By contrast, Rule 32.2(a)(2) sets forth Arizona' preclusion doctrine by providing that "[a] defendant shall be precluded from relief under this rule based upon any ground" "[f]inally adjudicated *on the merits* on appeal or in any previous collateral proceeding." Ariz. R. Crim. Pro. 32.2(a)(2) (emphasis added).

The last reasoned opinion on Lambright's ineffective assistance of counsel did not clearly invoke a procedural default rule and therefor does not bar federal review. It is well established that "a procedural default does not bar consideration of a federal claim on either direct or habeas review unless the last state court rendering a judgment in the case clearly and expressly states that its judgment rests on a state procedural bar." *Harris v. Reed*, 489 U.S. 255, 263, 109 S. Ct. 1038, 103 L.Ed.2d 308. Indeed, "a procedural default based on an ambiguous order that does not clearly rest on an independent and adequate state ground is not sufficient to preclude federal collateral review." *Morales v. Calderon*, 85 F.3d at 1392.

In *Ceja v. Stewart*, 97 F.3d 1246, 1253 (9th Cir. 1996), we held that a state court's finding that was virtually indistinguishable

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from the one in this case did not bar federal habeas review. There, the state court rejected Ceja's second post-conviction petition "for the reasons stated in [the State's] Response to Petitioner's Petition." In the response, the State had argued that, "all of petitioner's grounds are precluded because petitioner either knowingly, intelligently and voluntarily withheld them on direct appeal or his previous Rule 32 proceedings, or they have been previously determined against petitioner's position on the merits." *Id.* We concluded that a finding of both waiver, based on a petitioner's failure to comply with procedural rules, and preclusion, based on a court's belief that the state courts had already adjudicated and rejected the claim, was "inconsistent." *Id.* In ruling that such an inconsistent order did not bar federal review of Ceja's dismissed claims, we explained, "[p]reclusion does not provide a basis for federal courts to apply a procedural bar. By adopting Arizona's mixed arguments of preclusion and waiver with respect to these claims, the state court in Ceja's second Rule 32 proceeding did not clearly base its decision on independent and adequate state grounds." *Id.* (citations omitted).

The order in this case similarly does not bar federal review. Like the order in *Ceja,* the state court's ruling in Lambright's case contains mixed and inconsistent findings of preclusion and waiver. By invoking two contradictory arguments, the state court failed to make a clear finding of procedural default and federal review is not barred.

Because the state court in this case did not clearly and expressly invoke a procedural bar as the basis of its ruling, the State's reliance on *Poland v. Stewart*, 169 F.3d 573 (9th Cir. 1999), is misplaced. In *Poland*, the state court dismissed the petitioner's constitutional claims on procedural grounds without explanation. *Id.* at 579. Faced with the unexplained state court order, we looked to the prior proceeding to determine whether it was based on procedural default. *Id.*[6] In doing so, we specifically contrasted the order in *Poland*, which was unexplained, with the order in *Ceja*, which by including "mixed arguments of preclusion and waiver with respect to these claims . . . did not clearly base its decision on independent and adequate state law grounds." *Id.* at 579 n. 10 (quoting *Ceja*, 97 F.3d at 1253). Because the order in this case also included "mixed arguments of preclusion and waiver with respect to [Lambright's ineffectiveness] claim," it does not bar federal habeas review.

III.

Lambright asserts that he is entitled to an evidentiary hearing because he has raised a colorable claim of ineffective assistance of counsel and no state court has ever granted him an opportunity to develop his claim. We agree and therefore remand to the district court. See *Siripongs v. Calderon*, 35 F.3d 1308, 1310 (9th Cir. 1994).

To ultimately prevail on his ineffective assistance of counsel claim, Lambright must show that his counsel's performance was deficient, and that the deficient performance prejudiced him. *Strickland v. Washington*, 466 U.S. 668, 690, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984); see also *Williams v. Taylor*, 529 U.S. 362, 120 S.Ct. 1495, 1514-15, 146 L.Ed.2d 389 (2000). Defense counsel have a general "duty to make reasonable investigations or to make a

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6. Our examination of the earlier state court order was consistent with the Supreme Court's instruction in *Ylst*, 501 U.S. at 803, 111 S. Ct. 2590, that "where, as here, the last reasoned opinion on the claim explicitly imposes a procedural default, we will presume that a later decision rejecting the claim did not silently disregard that bar and consider the merits."

reasonable decision that makes particular investigations unnecessary." *Strickland*, 466 U.S. at 691, 104 S. Ct. 2052.

Lambright argues that an extensive series of "red flags" should have motivated counsel to investigate his psychiatric condition

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and to present mitigating psychiatric testimony at sentencing. Lambright's presentence Psychological Evaluation told of his service in Vietnam, during which he witnessed the violent death of friends, and the mental breakdown that he suffered after returning to this country. It described some of the hallucinations he had experienced and his subsequent need for hospitalization in a mental facility. The report also mentioned two of Lambright's attempts to commit suicide. In an affidavit before the district court, moreover, Lambright wrote that he had "discussed his past mental problems and drug use with his trial counsel." There can be no doubt that Lambright has raised a colorable claim of deficient performance. Counsel's alleged failure to obtain a psychiatric evaluation of Lambright, despite knowing of his wartime experience and extensive drug abuse, is the type of performance courts have labeled deficient under *Strickland*. *See Williams*, 120 S. Ct. at 1514 (holding that the failure to "conduct an investigation that would have uncovered extensive records graphically describing [the petitioner's] nightmarish childhood" constituted deficient performance); *Turner v. Ducan*, 158 F.3d 449, 456 (9th Cir. 1998) ("[Counsel's] failure to arrange a psychiatric examination or utilize available psychiatric information also falls below acceptable performance standards."); *Seidel v. Merkle*, 146 F.3d 750, 755 (9th Cir. 1998) (holding that counsel was ineffective in failing to conduct any investigation into his client's psychiatric history despite evidence that the petitioner had been treated with medication while awaiting trial, that he had been treated in a V.A. Psychiatric Hospital, and that he suffered from a mental illness, namely Post Traumatic Stress Disorder), *cert. denied*, 525 U.S. 1093, 119 S. Ct. 850, 142 L.Ed.2d 704 (1999).

We have also held that the failure to interview family members, in light of indications of mental disorder, constitutes deficient performance. *See Seidel*, 146 F.3d at 750. In this case, had counsel interviewed Lambright's sister, he would have learned that Lambright

began to display signs of a mental disorder as soon as he returned from Vietnam. In an affidavit before the district court, she described her brother's behavior as "kind, gentle and well-behaved" before serving in Vietnam, after which "his behavior and manner were greatly changed. He appeared extremely tense paranoid and nervous. He began using drugs and alcohol during this period." She also wrote that, after deliberately smashing his car into a tree, he told her that "he was so mad and mixed up, suicide seemed like the best way out." On another occasion, Lambright showed up at her house in the middle of the night and banged on her screen door. When she got up to see who it was, she saw her brother cowering against a wall, hiding. He was crying and muttering incoherently. Then he said, "I gotta get to'em. I see 'em, they're burning, Mom and Daddy, they're burning."

Psychiatric evaluations of Lambright after the court imposed the death penalty indicates the seriousness of his trial counsel's alleged failure to conduct reasonable investigations. Before the district court, Lambright introduced the affidavit of Dr. Donald Stonefeld, a medical doctor specializing in psychiatry with a sub-specialty in neurology and post traumatic stress disorder. After reviewing Lambright's history, Dr. Stonefeld concluded that "an emotional illness did exist at the time of the offense," and that the documents he reviewed "indicate post-traumatic stress disorder and a probable disorder due to excessive drug use." He also recommended "[t]hat a full mental examination of Mr. Lambright is necessary and warranted in order to determine his mental condition at the time of the offense." In addition, Lambright introduced the affidavit of a pharmacologist, Martha Fankhauser, who concluded that "chronic amphetamine use such as is reported by Mr. Lambright may case long-term psychiatric changes including anxiety reactions [and] psychosis." Like Dr. Stonefeld, she recommended that "a psychiatric evaluation of Mr. Lambright is desirable and necessary in order to determine if

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there is an underlying psychiatric disorder which may have been brought on by the ingestion of these substances." Lambright has presented more that enough evidence to establish a colorable claim of deficient performance.

We have no doubt that Lambright also has a colorable claim of prejudice under *Strickland*. Lambright's lawyer presented no psychiatric evidence or argument at the sentencing hearing. The evidence Lambright has presented, without the benefit of a hearing, shows that his lawyer could have presented extensive mitigating evidence at sentencing. Instead, Lambright's counsel stated meekly, "I have one witness who will be very brief." The witness was correction officer who testified as to Lambright's conduct during a six-month period while he awaited trial. We have previously found that the prejudice requirement is met where "defense counsel effectively presented no mitigating evidence at sentencing, despite the presence of aggravating factors." *Smith*, 189 F.3d 1004, 1013 (9th Cir. 1999), *cert. denied*, — U.S. —, 121 S. Ct. 358, 148 L.Ed.2d 288, 2000 WL 1056515 (2000). Prejudice is especially likely where, as here, "this is not a case in which a death sentence was inevitable because of the enormity of the aggravating circumstances." *Bean*, 163 F.3d at 1081. In fact, in this case the State argued that only one aggravating factor existed. Although the offense in this case certainly was brutal and sadistic, the Supreme Court in *Williams* recently noted that "[m]itigating evidence unrelated to dangerousness may alter the jury's selection of penalty, even if it does not undermine or rebut the prosecution's death-eligibility case." *Williams*, 120 S. Ct. at 1516; see also *Correll v. Stewart*, 137 F.3d 1404, 1413 ("[B]ecause trial counsel failed to present any evidence of Correll's purported mental illness which may have satisfied Ariz. Rev. Stat. § 13–703(E), Correll has 'undermined confidence in the outcome' of the sentencing, thereby establishing the requisite Strickland prejudice."). Evidence of mental disabilities or a tragic childhood can affect a sentencing determination even in the most savage case. We are compelled to order an evidentiary hearing so that the district court can determine both the quality of Lambright's counsel's performance and its effect on the decision to sentence him to death.

IV.

We reverse the judgment of the district court and remand for an evidentiary hearing. We remand for the district court to determine whether Lambright was denied effective assistance of counsel at

sentencing because of the failure to investigate and present evidence of his psychiatric condition and social history.

Concurrently herewith we file a memorandum disposition in which we affirm the Petitioner's conviction and the district court's ruling that the especially heinous, atrocious, and cruel aggravating factor applies in this case for the reasons stated therein. Accordingly, the judgment below is

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED for further proceedings consistent with this opinion.

APPENDIX B

FILED

May 15, 2001
Cathy A. Catterson, Clerk
U.S. Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOE LEONARD LAMBRIGHT, Petitioner-Appellant, v. TERRY STEWART, Director, Arizona Department of Corrections, Respondent-Appellee.	)	No. 96-99020 DC# CV-87-00235-TUC-RMB Arizona ORDER
ROBERT DOUGLAS SMITH, Petitioner-Appellant, v. TERRY STEWART, Director, Arizona Department of Corrections, Respondent-Appellee.	)	Nos. 96-99025, 96-99026 DC# CV-87-00234-TUC-RMB Arizona ORDER

Before: FERGUSON, REINHARDT, THOMPSON, Circuit Judges

The panel has voted to deny the petition for rehearing filed by the petitioners.

The full court has been advised of the suggestion for rehearing en banc and no judge

has requested a vote on whether to hear the matter en banc.

The petition for rehearing is DENIED and the suggestion for rehearing en banc is

REJECTED.

APPENDIX C - Arizona Rules of Criminal Procedure

Rule 31.4 Motion to stay appeal; notice of reinstatement of appeal; consolidation of appeals

a. Motion To Stay Appeal; Notice of Reinstatement of Appeal.

(1) The Appellate Court, on motion of a party or on its own initiative, may stay an appeal while a motion under Rule 24 or a petition under Rule 32 is pending. If a stay is ordered, the clerk of the Appellate Court shall notify all parties, the clerk of the trial court, and, if the transcript has not yet been filed, the appropriate court reporters.

(2) Within 20 days after the trial court's decision on the motion or petition, the appellant shall file with the clerk of the Appellate Court, and send to all persons notified of the stay, either a notice of reinstatement of the appeal or a motion to dismiss the appeal under Rule 31.15(a)(2).

b. Consolidation of Appeals.

(1) Appeals which raise a common question of law or fact may be consolidated at any time by order of the Appellate Court upon its own initiative after opportunity has been given to the parties to raise objections or upon motion of a party or upon stipulation by the parties.

(2) An appeal from a final decision on a Rule 24 motion or Rule 32 petition filed prior to a notice of appeal or filed while an appeal is pending and decided while the appeal is stayed, shall be consolidated with an appeal from the judgment or sentence, unless good cause is shown why such consolidation should not occur.

Comment

This rule is intended to prevent unnecessary duplication and to further define the relationship between appeals and collateral post-conviction procedures. See Rules 31.2(f)(4), 24.2 and 32.2.

Rule 31.4(a). Under Rule 31.3 a notice of appeal must be filed within 20 days of entry of judgment and sentence, and under Rule 31.11 the appeal is perfected at the time the first major filing is due in the appellate court. Under Rules 24.2 and 24.3(a), a defendant may move the trial court to vacate a judgment or unlawful sentence before an appeal is perfected. Under Rule 32.1 a party may file a petition for post-conviction relief at any time subject to Rule 32.2, which precludes the filing of a petition based on any issue still raisable on appeal or in a Rule 24 post-trial motion. In effect, during the pendency of an appeal, a Rule 32 petition is available only after perfection of the appeal and only to raise issues not still raisable on appeal, such as those for which there is no record. Thus, it is possible that proceedings may be pending in both the trial and appellate courts.

Section (a) is intended to empower the appellate court to stay the appeal whenever this jurisdictional overlap threatens to waste the efforts of the courts or the parties. There is no mandatory stay provision. The decision is left with the sound discretion of the appellate court, to balance the delay in prosecution of the appeal against possible gains in judicial efficiency, including elimination of the appeal if the motion or petition is granted or consolidation of an appeal from the decision on the motion or petition with the appeal already pending.

Rule 31.4(b). Rule 31.4(b) encompasses two situations. Paragraph (1) governs when separate appeals are taken from the same or similar cases such as when co-defendants file separate appeals. Consolidation is discretionary. The parties have an opportunity to raise objections to consolidation whether it is suggested by a party or by the court. See Rules 35.1 and 35.3.

Paragraph (2) governs the situation covered in Rule 31.4(a) and is made virtually mandatory since the parties to the appeal from the Rule 24 motion or Rule 32 petition and to the appeal from judgment and sentence will nearly always be identical. Such appeals should

be consolidated automatically unless it can be shown that such consolidation would substantially prejudice one of the parties.

Rule 32.2. Preclusion of remedy

a. Preclusion. A petitioner will not be given relief under this rule based upon any ground:

(1) Still raisable on direct appeal under Rule 31 or on post-trial motion under rule 24;

(2) Finally adjudicated on the merits on appeal or in any previous collateral proceeding;

(3) Knowingly, voluntarily and intelligently not raised at trial, on appeal, or in any previous collateral proceeding.

b. Exceptions. Rule 32.2 shall not apply to claims based on Rules 32.1(d), (e) and (g).

c. Inference of Waiver. The court may infer from the petitioner's failure to appeal or to raise an issue on appeal after being advised by the sentencing judge of the necessity that he do so, or his failure to raise any ground then available to him in a previous Rule 32 proceeding in which he was represented by counsel, that he knowingly, voluntarily and intentionally relinquished the right to do so.

d. Standard of Proof. The prosecutor shall plead and prove any ground of preclusion by a preponderance of the evidence; however, the inference of section (c) shall be considered part of the evidence.